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Supreme Court of the United States

October Term, 1978

No. 78-1362

RAYMOND WALKER,
Petitioner,

v.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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The petitioner, Raymond Walker, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in this proceeding on July 26, 1978.

OPINION BELOW

The opinion of the Supreme Court of Ohio captioned, *State v. Walker*, 55 Ohio St. 2d 208 (1978), appears in the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on July 26, 1978. A timely motion for rehearing was denied on December 7, 1978, and this petition for

certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) (1970).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the conviction in the instant case was so devoid of evidentiary support as to render it unconstitutional under the Due Process Clause of the Fourteenth Amendment.

2. Whether the conviction in the instant case was unconstitutional under the Due Process Clause of the Fourteenth Amendment where the atmosphere in and around the courtroom was so hostile as to interfere with the trial process.

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1, Amendment 14, United States Constitution, which provides in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

This proceeding involves the first degree murder conviction of Raymond Walker. On March 12, 1976, Raymond Walker was indicted by the Stark County Grand Jury for first degree murder, being charged with killing, while perpetrating a robbery on July 22, 1972, Guy Mack, a Canton detective. That he was arrested, let alone indicted and convicted, is remarkable because on that day Raymond

Walker was residing in the Cuyahoga County Jail, having been arraigned on April 14, 1972 on a charge of attempted burglary and having been unable to raise $5,000 in bail (T-306). He was not released until August 1, 1972 (T-307). Canton, Ohio, is located approximately 50 miles from the Cuyahoga County Jail.

The first trial of the petitioner resulted in a hung jury. At the second trial, the prosecution stipulated that according to the jail and court records of Cuyahoga County, the petitioner was confined in the Cuyahoga County Jail on July 22, 1972. Three fellow inmates of the Cuyahoga County Jail during the pertinent period of time testified that Mr. Walker was never absent from his cellblock, except for occasional court appearances (T-340, 351, 352, 428, 569, 570). Individuals employed by the Cuyahoga County Sheriff's Department testified that a body count was taken each night and unless this count corresponded with records kept at the jail's booking desk, a cellblock search would be conducted. On July 21, 1972, the date of the aborted attempt at robbery (T-176, 235), there was activity in Walker's commissary account in the jail indicating he must have been there (T-85, 86, 407, 408, 952).

The difficulty in escaping unnoticed from the jail was demonstrated by testimony concerning the physical characteristics of the jail. The booking desk in the basement of the jail is its main center (T-696). Everyone going in or out, whether it be prisoner, visitor, deputy sheriff, or lawyer, must pass by the booking desk (T-696, 697, 762). After one has passed the booking desk, one must proceed through two gates, each of which is locked (T-696, 697), and a locked door (T-698). Two elevators, each of them operated manually, carry persons to the upper floors of the jail (T-697-699). If Raymond Walker had been on the streets on July 21 and 22, 1972, at least

50 persons would have been aware of it. There were 54 prisoners in the block with him (T-343). During each of the three shifts, there was at least one deputy on the floor and probably more, depending on the manpower (T-65). He would have had to have gone to the tenth floor to get his civilian clothes (T-708, 847). Checking them out would have brought him into contact with at least one other person. He would then have had to get on the elevator, which was manually operated. The attendant would have known he was leaving. At the basement level, someone would have to unlock the door and the two gates. Thus, at least, one more person would have been aware that he was leaving. Then he must proceed past the booking desk, and at least one more witness, before reaching the street.

No evidence was presented as to how the petitioner could have possibly left the jail and re-entered unnoticed after committing the alleged crime.

The way the alleged accomplices, Warren Davidson and Fred Ogeltree, explain the crime, Raymond Walker was the mastermind behind the robbery of the Canton A & P store (T-174, 233-234). He enlisted their aid in an after-hours "joint" operated in Cleveland in the early morning hours on Friday, July 21, 1972 (T-168, 231). That morning the three of them and a white man drove to Canton, but the white man became frightened and the crime was aborted (T-176, 235).

The next day, Saturday, July 22, the three and a man named Bennett returned to the Canton A & P store. Davidson waited outside while the other three went into the store (T-179). Guns drawn, Ogeltree stood at the door, the gunman at the cash registers (there were four lanes in the supermarket) (T-113), and Bennett went into

the manager's booth (T-237). Guy Mack, an off-duty Canton policeman, was at aisle No. 3 with his wife (T-133-134). He lunged at the gunman, who shot him (T-237-238). The felons rushed out of the supermarket, got into the cars and returned to Cleveland (T-180-183, 239).

Davidson and Ogeltree were apprehended soon thereafter, each pled innocent, each testified at his trial that he was not involved in the robbery, and each was convicted (T-172, 173, 229).

In 1976 Ogeltree and Davidson approached Fred Meyers in the Lucasville Penitentiary (T-450-451). Meyers was the "jailhouse lawyer" (T-449). They told Meyers that they could not understand how they could be forced to serve a life sentence, having only stolen a car and the job having been pulled by "three junkies from Detroit" (T-453-454). He explained the felony-murder rule to them. They were tired of being in jail and knew commutation of their sentences was possible only if they named the triggerman (T-455-456). He told them that designating an anonymous junkie would not satisfy the authorities (T-456). Ogeltree replied that he did not know the name of the triggerman but he would have a name in a week (T-455-456); that a friend of his was going to get for him the name of "the nigger that's laying my old lady" (T-458-459).

The prosecution attempted to corroborate the accomplices' testimony by producing a parade of witnesses who were at the scene of the crime. Audrey Melton, a customer in the express lane in the supermarket, could make no identification (T-113). Roy O'Grady, the manager in the booth, could make no identification (T-131). Byron Lowther, the clerk at check-out counter No. 3, where the murder occurred, could make no identification (T-141).

Rose Caly, the clerk at the express counter, identified Ogeltree, but could make no identification of Walker (T-149).

Earl Alexander, sitting in the parking lot waiting for a neighbor at the time of the robbery, heard gunshots and saw three men running out of the supermarket (T-109). He stated he could identify the men and that none of them were in the courtroom (T-110). Thus, one of the prosecution's own witnesses directly contradicted the testimony of Ogeltree and Davidson.

Rene Clark was the only witness to positively identify Walker as the triggerman (T-271). At the time of the robbery she was sixteen years old (T-272). Three years later she went to a line-up and designated subject No. 1 with a question mark (T-276). Thereafter Detective Newkirk of the Canton police, on seeing what she had done, came up to her and said he "ought to kick your butt all the way to Detroit." (T-973). It is not surprising that at the trial she made a positive identification of the petitioner, who was No. 5 at the line-up.

Furthermore, Miss Clark described the triggerman as darker than Stanley Tolliver (T-276) and as dark as one Mr. Dansby (T-278). Mr. Tolliver has described Mr. Dansby to his co-counsel as being as dark as the ace of spades. Miss Clark attempted to explain the discrepancy between Walker's color and that of Mr. Dansby by claiming that at the time of the murder the sun had made Walker as dark as Mr. Dansby (T-278-279). The petitioner sitting in Cuyahoga County Jail, could have had little opportunity to sun himself in the summer of 1972. Miss Clark was a strongly partisan, suggestive witness and it is obvious from her testimony that she had picked the wrong man but was determined to stick with the choice.

Mrs. Mack, the wife of the victim, who was next to her husband in the check-out line during the shooting, could not bring herself to say that the petitioner committed the crime, stating merely that he looked like the man. Mrs. Mack, like Rene Clark, had selected subject No. 1 as the triggerman in the 1975 line-up rather than subject No. 5, Walker.

In spite of the fact that the prosecution presented no evidence as to how the petitioner managed to escape from the Cuyahoga County Jail and gain re-admittance, the petitioner was convicted of first degree murder.

The Court of Appeals for the Fifth Appellate District of the State of Ohio affirmed the conviction of the petitioner. The Ohio Supreme Court granted Walker's motion for leave to appeal and subsequently affirmed the conviction in a five-to-two decision.

The first question presented for review was initially raised at the trial level of the proceeding. Petitioner moved, pursuant to Rule 29 of the Ohio Rules of Criminal Procedure, for a judgment of acquittal at the close of the state's case, and upon conclusion of the defense. The court denied both motions. The lack of evidentiary support for the conviction was again raised in the Court of Appeals in petitioner's first and second assignments of error. The first question presented was set forth in the Supreme Court of Ohio in petitioner's first and second propositions of law. The majority of the Supreme Court and Court of Appeals found sufficient evidentiary support to uphold the conviction.

Objections to the hostility of the trial court which denied petitioner due process of law were made at various points in the trial proceeding. The petitioner's entire brief in the Court of Appeals centered on the unfairness of

the proceedings. Specific points where the due process violations were raised are set forth in detail in the text of the second question presented for review. The denial of due process was again raised in the petitioner's sixth proposition of law presented to the Supreme Court of Ohio. The court found that the atmosphere was not so hostile as to deny the petitioner due process of law.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT AND WITH FUNDAMENTAL JUSTICE IN UPHOLDING A CONVICTION WHICH IS DEVOID OF EVIDENTIARY SUPPORT.

Petitioner recognizes that it is not the function of this Court to review evidence and discuss specific facts. However, this Court will consider the question of whether the charges against a petitioner were so totally devoid of evidentiary support as to render the conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. *Thompson v. Louisville,* 362 U.S. 199 (1960).

> "It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process." *Harris v. United States,* 404 U.S. 1232, 1233 (1971) (Douglas, *J.*, in chambers)

See also, *Vachon v. New Hampshire,* 414 U.S. 478 (1974). In addition, this Court has reviewed the sufficiency of the evidence upon which a conviction is based. *Washington v. United States,* 357 U.S. 348 (1957).

In the instant case, the evidence presented at trial was simply not of a quality sufficient to support a conviction in

conformity with due process of law. The principal witnesses against Walker were the alleged accomplices, Ogeltree and Davidson. Ohio has recognized that such testimony ". . . is inherently suspect and untrustworthy and we approach it with utmost caution." *State v. Klein,* 50 Ohio St. 2d 11 at page 14 (1977).

The testimony of Ogeltree and Davidson is more than ordinarily suspect. Both lied in maintaining their innocence during their trials in which they were convicted (T-173, 229). Tired of jail, the two designated Walker as the murderer three years after the incident with the hope of leniency (T-173, 188, 224, 241, 242). Ogeltree bore malice toward Walker because he became involved with Dolores Ogeltree at the time her marriage to Ogeltree had floundered (T-623). Furthermore, Ogeltree had specifically admitted to three persons that Walker was not involved in the robbery and murder. Not only did he admit to Fred Meyers, as related on page 5 above, but during a visit at the Stark County Jail with Dolores Ogeltree and Mable Potts, he told them Walker was innocent (T-601, 603. 609, 622).

Ogeltree and Davidson's testimony was not merely inherently suspect. Corroboration was so tainted as to make it worthless. Of the ten eyewitnesses, nine could not identify the petitioner as a participant in the crime (T-97, 105, 106, 115, 131, 136, 141). The seventh, Rene Clark, had selected a different subject at a prior line-up and had described the triggerman as being significantly darker than Mr. Walker. Her in-court identification occurred after a Canton detective had threatened "to kick [her] butt all the way to Detroit" (T-973). Under these circumstances, her in-court identification cannot be properly given any weight.

Even when reviewed in a vacuum, the evidence presented by the state was insufficient to support a conviction in conformity with due process of law. When the state's evidence is examined in light of Walker's alibi that he was in jail on the date of the murder, any possible credibility which could be given the state's evidence disappears. According to the Cuyahoga County Court and Sheriff Department records and the testimony of the sheriff's deputies and fellow inmates, Raymond Walker was incarcerated on the date of the murder. The physical characteristics of the jail made an unobserved escape and readmittance impossible. There is a certain horror in the belief that human nature is so base that not one of the over fifty people who would have been aware of Walker's absence, including governmental officials, would not, after having learned of the murder, come forward to testify against him. Such a cover-up is unprecedented.

The evidence produced against the petitioner was so discreditable and untrustworthy as to constitute "no evidence" for the purpose of applying the *Thompson* standard.

Assuming, arguendo, that this conviction is not susceptible to challenge under the *Thompson* standard of review, petitioner submits that this case presents an excellent opportunity for the Court to reconsider the standard of *Thompson* in light of this Court's more recent decision in *In re Winship*, 397 U.S. 358 (1970). *Winship* held that the Due Process Clause requires proof beyond a reasonable doubt of every element of a crime and that a jury must be instructed accordingly.

> "Properly instructed juries, however, occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt—even when it is clear that the defendant was entitled

> to a directed verdict of acquittal as a matter of law. In a federal trial, such improper application of law (as defined by *Winship*) to fact requires reversal of the conviction on the ground of insufficient evidence.
>
> "The power of a federal court to review the application of federal law to the facts as found also operates, however, in criminal cases originating in state courts." *Freeman v. Zahradnick*, 429 U.S. 1111, 1112 (1977) (Steward, J., dissenting)

The dissenting opinions of Justice Marshall, with whom Justice Brennan joined, and Justice Marshall, in *Freeman*, suggest that the question of whether there was sufficient evidence to support a finding by a rational trier of fact of guilty may be of constitutional dimension. Justice Steward stated at page 1113 that:

> "Such a view would not require federal courts to second-guess state-court findings of fact or a State's definition of the elements of a crime. Rather, the federal courts would no more than perform a familiar and appropriate role—reviewing the *application* of a substantive federal standard (the requirement of proof beyond a reasonable doubt) to the historical facts."

The application of the *Thompson* standard, in which the court determines whether the conviction rests upon any evidence rather than upon sufficient evidence, is difficult to apply:

> "Evidence that a defendant is a narcotics addict makes it more likely that he has stolen property (to finance his habit) than it would be without such evidence. Can it therefore be said that there is 'some evidence' that the addict is a thief? If not, can any definable content be discerned in the 'no evidence' rule? Indeed, in the *Thompson* case itself, could it fairly have

been said that the mere fact that the defendant was found in a cafe, rather than home in bed, was *some* relevant evidence that he was guilty of loitering and disorderly conduct?

"My tentative view is that where the evidence falls far short of supplying adequate proof of guilt for a rational trier, to require judges to determine how speculative is too speculative to satisfy the no-evidence rule is to require the impossible. The ordinary standard of 'sufficiency of the evidence,' by contrast, is one familiar to state and federal judges and lawyers. Although like most legal standards it is not reducible to any mechanical formula, it does have a stable content permitting predictable adjudication." *Freeman* at 1113 (Steward, *J.*, dissenting)

Petitioner submits that certiorari should be granted to determine if the court below erred in affirming a conviction in violation of the *Thompson* standard. In addition, this case presents an excellent opportunity to review the validity of the *Thompson* case in light of the more recent decisions of the Court.

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT WHICH HAVE HELD THAT AN ACCUSED IS DENIED DUE PROCESS OF LAW WHERE THE ATMOSPHERE IN AND AROUND THE COURTROOM IS SO HOSTILE AS TO INTERFERE WITH THE TRIAL PROCESS.

The petitioner was convicted without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. The record in the instant case demonstrates that Walker was denied a fair and unbiased

trial because the overt hostility toward law enforcement officials in Cuyahoga County made an impartial verdict impossible, because the judge was not a disinterested mediator, and because the large amount of irrelevant and prejudicial evidence introduced at this trial caused the verdict to be based on speculation and conjecture rather than on competent evidence.

A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133 (1955).

"The very purpose of a Court system is to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures." *Craig v. Harvey*, 331 U.S. 367, 377 (1947)

In *Moore v. Dempsey*, 261 U.S. 86 (1923), it was held that the atmosphere in and around the courtroom might be so hostile as to interfere with the trial process, even though an examination of the record disclosed that all the forms of trial conformed to the requirements of law: the defendant had counsel, the jury members stated they were impartial, the jury was correctly charged, and the evidence was legally sufficient to convict. In *Frank v. Mangum*, 237 U.S. 309, at 346 (1915), (dissenting opinion), Justice Holmes stated that even though "every form [be] preserved," the forms may amount to no "more than an empty shell" when considered in the context or setting in which they were actually applied.

In three decisions, *Estes v. Texas*, 381 U.S. 735 (1965); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) and *Irwin v. Dowd*, 366 U.S. 717 (1960), this Court has held that sensational press coverage could deprive a defendant of due process of law because it deprived him of the judicial serenity and calm to which he was entitled.

In *Turney v. Ohio,* 273 U.S. 510 (1927) this Court stated that:

> "Every possible procedure which would offer a *possible* temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law." at 532 (Emphasis added)

Similarly, in *Murphy v. Florida,* 421 U.S. 794 (1974) this Court held that the constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors.

The petitioner was denied a calm and solemn adjudication of his guilt or innocence before an impartial tribunal. The judicial system was determined to obtain the conviction of a "triggerman" of this crime at any cost. Stretch Meyers, an inmate at Lucasville, testified in October, 1973, that Judge DeHoff asked him to keep his ears open in Lucasville because they were interested in settling the Guy Mack murder (T-470). Thus, even the trial judge demonstrated an interest in solving this crime which exceeded the bounds of judicial propriety and indeed cast him in the role of a second prosecutor.

An example of the patent complicity between the trial court and the prosecution is presented in the situation of John Appling. Appling, a giant of a man weighing 260 pounds (T-482), was called but refused to be sworn or to testify (T-51). After a fruitless voir dire the judge took him privately into chambers, ostensibly to persuade him to testify (T-61). He subtly threatened him with a letter to the parole board (T-61). Although he knew that Appling had nothing to offer in the trial of this

matter, the judge persuaded him to take the stand without being sworn and, before the jury, elicited from him his name, his address in Cleveland, the fact that he was in prison and that he refused to testify (T-61, 62). Throughout the trial the court permitted the prosecutor, usually over objection, to inquire of various witnesses whether Appling had been in the Cuyahoga County Jail at the time Walker was confined (T-78, 343-347, 351, 570-571, 667, 905-907). They stated that he was not only in jail with Walker but on the same range and that he was the range boss. Obviously the purpose of this interrogation was to suggest to the jury that Appling had some information concerning Walker's ability to pass through the gates of the jail at will. Presenting this incomplete testimony and then permitting the jury to speculate as to what Mr. Appling would have said if he had not refused to testify clearly violated the right of the appellant to be tried on the basis of competent evidence and not conjecture.

The court even compounded matters by permitting the prosecutor in his cross examination of Fred Meyers to insinuate that Appling had been threatened in order to cause him to change his testimony and to suggest that Meyers had persuaded Appling to refuse to testify with the promise of a nice job at Lucasville, a promise that was outside Meyers' ability to perform (T-481-483).

The prosecution, with the concurrence of the trial court, launched into a full-scale attack against the Cuyahoga County Jail, bringing in matters that had absolutely nothing to do with Raymond Walker, his guilt or innocence, and were designed to impress the jury with the inadequacies of the Cuyahoga County Jail without contributing a single probative fact concerning this case. Over objection the prosecutor was permitted to inquire into the crowded condition of the jail and its investigation by the community

groups (T-661-667), gambling in the jail (T-679-680), the use of drugs in the jail (T-733-736), the shortage of funds in the commissary (T-680), the burning of commissary books and records (T-737-739) and a hunger strike of the inmates (T-741). The information was garnered from newspaper accounts and copies of articles were proudly waved by the prosecutor before the jury (T-662-665, 734-736, 737, 739, 872, 873). Significantly, there were no newspaper articles concerning persons walking in and out of jail at will.

Over objection the prosecution was permitted to bring out that Major Paine, who was not even employed by the sheriff at the time Walker was confined (T-676, 717), was convicted of theft of property in 1976 (T-676-678, 749, 750).

In addition, the prosecution was permitted to go into great detail concerning an investigation in 1976 by the state auditor's office of a shortage of funds in the commissary operated by Sheriff Kreiger (T-896-902, 930-942). The state examiner was even permitted to testify that obstacles were imposed in his investigation by the sheriff's office and that he was required to go to court to get the records (T-932). He did admit on cross examination that the individual ledgers concerning the prisoners were adequate, that Walker's ledger showed a transaction on July 21, 1972 (T-952); and that his investigation concerned the back-up receipts of purchases for the commissary by the sheriff (T-495).

Neither the fact that there was an audit of the commissary funds in 1976 nor the matter investigated and revealed by the auditor was relevant concerning the issue of whether or not Raymond Walker was in jail on July 22, 1972. The auditor's investigation did not disprove the

entry of July 21, 1972 and served only to cast aspersions upon the Cuyahoga County Sheriff.

Detective Newkirk of the Canton police got his lance in. Over objection he explained that the delay in bringing Walker to trial was caused by the fact that Cuyahoga County would not extradite him from Illinois (T-962).

Presumably, the evidence complained of under this proposition of law was directed at refuting the alibi. We submit there is absolutely no logical connection, but the court in sanctioning the evidence led the jury to believe that it was of probative force in disproving Walker's alibi. Indeed, he as much as told them this as is indicated by the following colloquy concerning Major Paine at page 676 of the transcript:

"Q. And then Major Paine came in around November you believe?

A. He came in with Sheriff Kreiger in '69 and he was with us for a few years and then he left. And I know that he came back just before election.

Q. Did he come in as a major?

A. He was the warden when he came in.

Q. He started at the top in other words, right?

Mr. Tolliver: Object to relevancy.

The Court: Overruled.

A. He was a major when he left and when he came back. If I'm correct— I can't remember.

Q. He's no longer with the Sheriff's Department now is he?

A. No, sir.

Q. As a matter of fact he's not with the Sheriff's Department because he was indicted and found guilty of—

Mr. Tolliver: Object, judge.

Q. Theft of property, isn't that true?

Mr. Tolliver: Objection.

The Court: Overruled.

A. He was indicted right.

Q. And he was found guilty?

A. He was found guilty.

Q. Of theft of property from the jail?

A. Property of the jail?

Q. Isn't that true?

A. I think it was something about two guns that were missing.

Q. What was it evidence?

Mr. Tolliver: Continuing objection, judge, relevancy.

The Court: No, it's very relevant in this case. Overruled."

The court itself participated in the attack on Cuyahoga County. James Miller, a deputy clerk of courts of the Cuyahoga County Common Pleas Court, testified concerning the court records pertaining to Walker (T-301-312). After an exhaustive cross examination disparaging the procedures of the Cuyahoga County Court of Common Pleas (T-312-327), the following appears at page 327:

"Q. Can you tell me how many other mistakes you have made?

Mr. Tolliver: Objection to this, judge.

The Court: Yes, sustained.

Q. Nothing further.

A. I'm not a handwriting expert.

The Court: That answer will be stricken from the record. This witness will be admonished from

making a statement without a question before him, sir. You are not in Cuyahoga County today, and the jury will disregard it.

Mr. Tolliver: Oh, judge.

The Court: I withdraw that and the jury will disregard my remarks, too."

Another example of hostility towards Cuyahoga County is presented in the cross examination of Captain Frank Uranker of the Cuyahoga County Sheriff's Department. Tom Booth is an employee of the Cuyahoga County Sheriff who for obvious reasons was interested in the Walker case and on his days off attended the trial. The prosecutor inquired, with the jury present, of Captain Uranker as follows at pg. 681:

"Q. Do you know a man by the name of Tom Booth?

A. Tom Booth?

Q. Yes.

A. Yes.

Q. And he's a detective with the Cuyahoga County Sheriff's Department, is that true?

A. Yes, sir.

Q. And were you down here Friday?

A. Yes, sir.

Q. And during the conduct of this trial where was Tom Booth?

A. He was in this room.

Q. Had he been subpoenaed as a witness?

A. No, sir.

Q. He was down here on his own time?

A. That's right. That's what he told me.

Q. And did he also tell you that he came down because he had never seen a trial before?

Mr. Tolliver: Objection to all this judge.

The Court: Overruled.

A. He didn't say that to me.

Mr. Tolliver: Note my exception.

Q. Do you know why he came?

Mr. Tolliver: Objection.

The Court: Overruled.

A. No, sir.

Q. And were you aware that he was taking notes in the courtroom?

Mr. Tolliver: Objection, judge.

The Court: Overruled.

Mr. Tolliver: That's a fact not in evidence.

A. No, sir. After I—he came out and he said he was called into the chamber by the judge and he told me that the judge asked him why he was here and what was he doing in court. That's all I know.

Q. But you also know that during every recess prior to that time he came out of the courtroom and he had conversations with all of you didn't he?

Mr. Tolliver: Judge, note my continuing objection.

The Court: Overruled.

A. We talked to him but he didn't say nothing about the trial.

Q. What did he talk about?

Mr. Tolliver: Objection.

The Court: Overruled.

Mr. Tolliver: Compounded hearsay.

A. Oh, how long we going to have to wait here. I mean we didn't come out and say nothing about the trial.

Q. He didn't come out and tell you about the questions being asked about the commissary or the hunger strike?

A. No, sir. No, sir.

Q. Why did he have to wait?

A. I don't know.

Mr. Tolliver: Objection, judge.

The Court: Overruled."

Certainly, the prosecutor had no business asking these questions before the jury. If there was a violation of the court's order requiring a separation of witnesses, it should have been presented to the court out of the hearing of the jury. But after the court had called Detective Booth into chambers, to permit the prosecutor to insinuate that he was prompting the defense witnesses demonstrates that the cooperation between the court and the prosecutor made a fair trial impossible. See page 784 of the Transcript where a repetition of this line of inquiry was again sanctioned by the court.

The trial court also made some unusual rulings pertaining to opinion testimony. The term "killer snitch" refers to a person incarcerated in the penitentiary who testifies against his fellows. The court, over objection, permitted Warren Davidson and Fred Ogeltree to testify that as a result of their testimony they were in danger of their lives because of the social circumstances in the jail (T-171-172, 243-244), and permitted Royce Crim to verify this opinion (T-438, 439). Davidson and Ogeltree's testimony is self-serving and of doubtful value. Having permitted this kind of opinion testimony, however, it was

entirely inconsistent for the trial court to refuse to permit officers of the Cuyahoga County Sheriff's Department to render an opinion based upon their knowledge of the procedures, conditions, circumstances and records of the jail, as to whether Walker was in jail on July 22, 1972. The court repeatedly excluded the opinion testimony of the officers (T-87, 642-645, 790-791, 812-813). He condescended to permit Sergeant Baker to testify that the jail records indicated Walker was in jail, but emphasized to the jury that the evidence was confined to the records alone (T-877).

The court's partiality is also reflected by the fact that he was unduly supportive of the prosecution's principal witnesses, Mable Mack and Rene Clark. During the direct examination of Mrs. Mack, the following occurred at page 136 of the Transcript:

> "Q. Is there anyone in the courtroom who was in the store that day?
>
> A. Well, the accused looks very much like the man.
>
> Q. Are you—
>
> A. The man in a brown suit, brown tie, and beige-looking shirt.
>
> Q. Let the record show that the witness has identified the defendant.
>
> Mr. Tolliver: Objection. She has not.
>
> The Court: Well, the record will show that the defendant looks very similar like the man that she saw shoot her husband."

And at page 275 of the Transcript Mr. Tolliver was cross examining Miss Clark concerning the extremely important fact that she had picked the wrong man out of the line-up:

> "Q. And he told you now look at these five men. They were all black man, weren't they?
>
> A. Yes.
>
> Q. He said look them over good didn't he?
>
> A. Yes.
>
> Q. And if you see anybody in there you recognize pick him out isn't that right?
>
> A. Yes.
>
> Q. And you selected number one didn't you?
>
> A. What he said was—
>
> Q. Yes or no.
>
> A. Yes.
>
> Mr. Ake: I object.
>
> The Court: You may explain your answer, Miss Clark.
>
> A. It was the young man there he told me to go in and circle and if you wasn't sure or to put a question mark by it, the number that you circled. And then I went back and asked him.
>
> Mr. Tolliver: Now, just a minute.
>
> Mr. Ake: I don't think she's finished her answer.
>
> The Court: You may continue to explain your answer, Miss Clark.
>
> A. And then he—I went back to ask him to make sure what he said and I did. You know, I circled and put a question mark by it, but I knew."

The court's intervention in this line of questioning was unnecessary. It implied to the jury that Mr. Tolliver was being unfair, which he was not, and suggested that the trial court placed credence in Miss Clark's explanation.

An accused has a right to be "fairly tried in a tribunal free of prejudice, passion, excitement, and tyrannical

power." *Chambers v. Flondie,* 309 U.S. 227, 236-237 (1940). In the instant case, this right was denied, not by the actions of an outside press as was the situation in the *Sheppard, Estes* and *Irwin* cases, but by conduct of the judge and prosecutors themselves. Clearly this is an even more serious deprivation of due process.

The record demonstrates that the atmosphere in and around the courtroom was so hostile as to interfere with the trial process and to cause the verdict to be based on bias and speculation rather than on competent evidence.

The petitioner is entitled to a new trial before a fair and impartial tribunal. Petitioner submits that certiorari should be granted to determine if the court below erred in affirming a conviction in violation of the due process standards developed by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ohio Supreme Court.

Respectfully submitted,

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APPENDIX

ORDER OF THE OHIO SUPREME COURT DENYING PETITION FOR REHEARING

(Dated December 7, 1978)

No. 77-984

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellee,

vs.

RAYMOND WALKER,
Appellant.

REHEARING

It is ordered by the court that rehearing in this case is denied.

OPINION OF THE OHIO SUPREME COURT

(Decided July 26, 1978)

No. 77-984

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellee,

vs.

RAYMOND WALKER,
Appellant.

Criminal law—First-degree murder—Defense of alibi—Evidence attacking credibility thereof—Not prejudicial, when.

APPEAL from the Court of Appeals for Stark County.

Raymond Walker, A. K. A. Dewitt Ingram (appellant), was indicted on March 12, 1976, by the Stark County grand jury for the crime of first degree murder, R. C. 2901.01. The indictment, in relevant part, reads:

"That Raymond Walker * * * on or about the 22nd day of July in the year of our Lord one thousand nine hundred and seventy two * * * did purposely, in perpetrating or attempting to perpetrate robbery, kill Guy Mack * * *."

Guy Mack (decedent), an off-duty city of Canton police officer, was shopping with his wife for their weekly groceries in an A & P store located at 1800 East Tuscarawas, Canton, Ohio, on the morning of July 22, 1972. While their purchase was being tabulated, three men entered the

store. One remained by the door, another entered the manager's cage and the third proceeded to the checkout counters. The decedent then attempted to grab this third man, as he was collecting the money from the checkout counter. This third man fired three shots, two of which struck the decedent fatally wounding him.

Subsequently, Warren Davidson and Fred Ogeltree were arrested in connection with their participation in this crime. Both were convicted, in 1973, of first degree murder and sentenced to life imprisonment. While serving their sentences at Lucasville, Davidson and Ogeltree implicated the appellant as the person actually responsible for fatally shooting the decedent.

The second trial of the appellant for the murder of the decedent was commenced on August 23, 1976 (the first trial resulted in a hung jury). Both Davidson and Ogeltree testified at trial as to appellant's participation in the robbery. Ogeltree stated that he saw the appellant shoot the decedent. It was admitted during the trial that the Stark County prosecutor had agreed to send a recommendation to the Governor of Ohio, noting the cooperation of Davidson and Ogeltree in return for their testimony in the instant cause.

The state of Ohio (appellee) also introduced an eyewitness, Rene Clark, who at the trial positively identified the appellant as the man who shot the decedent. Other evidence was adduced by appellee to support its case. This evidence included, *inter alia*: (1) The decedent's wife, although unable to positively identify the appellant as the murderer, stated that he definitely looks very much like the man, and (2) Mrs. Willie Mae Hart testified that shortly after the crime occurred she saw a brown compact automobile being driven by a man with a bad complexion similar to appellant's. This testimony of Mrs. Hart to some

extent supported Ogeltree's and Davidson's testimony concerning the details of their and appellant's departure from the scene of the crime.[1]

The appellant introduced the defense of alibi. Appellant submitted in evidence the records of the Cuyahoga County jail, which show that appellant was therein incarcerated from April 14, 1972, until his release on August 1, 1972. Appellant further introduced other evidence in an attempt to discredit the testimony of Davidson and Ogeltree and that of Rene Clark.

In order to discredit appellant's alibi, appellee adduced various testimony, attempting to disprove the credibility of the records of the Cuyahoga County jail, including, but not limited to, the testimony of three people to the effect that they had seen appellant not in police custody but free in Cleveland in June of 1972.

On September 3, 1976, the jury returned a verdict of guilty. The trial judge thereupon sentenced the appellant to a term of life imprisonment.

Appellant then appealed to the Court of Appeals, which affirmed the judgment of the trial court.

---

1. Ogeltree testified that, after the robbery and the shooting, he departed in the stolen Plymouth (white automobile) along with Davidson and Bennett and that Robinson drove away in the brown automobile. He further stated that they returned to where they had left Bennett's Oldsmobile and then transferred from the Plymouth to the Oldsmobile.

Davidson testified that he drove the stolen Plymouth as they left the A & P supermarket with Bennett and Ogeltree in it and that appellant was ahead in the brown Maverick automobile.

Mrs. Hart stated, at trial, that she noticed a brown and a white car traverse her street twice on the morning of the incident. Additionally, she testified that on their return trip, about 20 minutes after she first saw them travel Monroe in the opposite direction, the white car was occupied by two males and it followed a brown automobile driven by one male with a rough complexion, similar to appellant's.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

Mr. James R. Unger, prosecuting attorney, and Mr. Dale T. Evans, for appellee.

Messrs. Merkel, Campbell, Dill & Zetzer, Mr. Ernest P. Mansour, Mr. Eli Manos, Mr. David B. Cathcart and Mr. Stanley E. Tolliver, for appellant.

Per Curiam.

I.

Appellant, in his first proposition of law, essentially asserts that the evidence presented at trial did not attain the requisite degree of proof needed to support his conviction. Our consideration of this proposition is limited to an examination of the record at the trial to determine whether the evidence presented, "which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *Atkins v. State* (1926), 115 Ohio St. 542, 546. This review is thus confined to a determination of whether there was substantial evidence. *State v. Sheppard* (1956), 165 Ohio St. 293, paragraph five of the syllabus; *State v. Stewart* (1964), 176 Ohio St. 156, 160.

A review of the record reveals that appellee produced the testimony of two accomplices, Davidson and Ogeltree, as to appellant's participation in the crime. Ogeltree testified that he saw appellant shoot the decedent. The record also contains the in-trial identification of appellant as the decedent's murderer by Rene Clark, an uninterested eyewitness. Her in-court identification of appellant withstood a vigorous cross-examination by appellant's counsel. Furthermore, the decedent's wife, Mrs. Mack, testified that the appellant looked "very much like the man" who shot

her husband. The testimony of Mrs. Hart, introduced by the appellee, corroborated the testimony of Davidson and Ogeltree with respect to their and appellant's fleeing the scene of the crime. Mrs. Hart, who lives in the proximity of the A & P food store, testified that on the morning of July 22, 1972, she observed two cars traverse the street where she lives at a very high rate of speed. Mrs. Hart stated that the first car was white and occupied by two males, and the second was a brown compact and was driven by a man with a rough complexion similar to the appellant's. Appellee also produced, in addition to the testimony of Davidson and Ogeltree, three other witnesses, who stated at trial that they had seen the appellant in Cleveland and free of custody during the period the records of the Cuyahoga County jail reflect his confinement therein.

Appellant, in his first proposition of law, does not argue the inadmissibility of any of the preceding evidence. Instead, appellant at first reiterates the evidence that was produced during the trial with respect to his alibi of incarceration in the Cuyahoga County jail on the date of the murder, *i. e.*: (1) The court and jail records show he was in jail on that date; (2) inmates testified that he was in jail continuously during the period of confinement; and (3) no evidence of appellant's escape from or surreptitious re-entering into the jail was produced at the trial. Appellant then proceeds to recount the evidence presented against him. He argues with respect to the testimony of Davidson and Ogeltree that they testified with the hope of leniency, referring to the Stark County prosecutor's promise to send a recommendation to the Governor. Appellant also states that Ogeltree bore malice toward him because of appellant's involvement with Ogeltree's former wife. Furthermore, appellant argues that it was revealed

at trial that Ogeltree had told three people that appellant was not involved in the robbery and murder. Concerning the testimony of Rene Clark, appellant cites her earlier identification of a person other than appellant as the decedent's murderer. Moreover, appellant states that there was testimony that, after Rene Clark failed to identify appellant in a lineup, she was verbally abused by Sergeant William Newkirk of the Canton Police Department. Appellant thus implies intimidation with respect to her in-trial identification of appellant, but the record reveals that she denied this and stated that her earlier misidentification was the intentional product of her fear. Appellant continues to proceed with his refutation of appellee's evidence. This court, however, discerns little utility in complete reiteration of appellant's argument.

It is readily apparent that appellant, in his first proposition, is not asserting the insufficiency of the evidence presented at trial, but is engaging in an attack on the credibility of the evidence. Clearly, the evidence produced by the appellee, "if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *Atkins, supra,* at page 546. Credibility is a question of fact to be determined by the jury and a reviewing court should not substitute its judgment for that of the jury. *State v. Kehn* (1977), 50 Ohio St. 2d 11; *State v. Wolery* (1976), 46 Ohio St. 2d 316. This court's recent statement in *Feliciano v. Kreiger* (1977), 50 Ohio St. 2d 69, 72, is controlling in this cause:

"Since reasonable minds could reach different conclusions concerning this testimony, determination as to what occurred was a question of fact for the jury. * * * *State v. Antill* (1964), 176 Ohio St. 61. This court on review will not disturb this jury finding so long as there was competent evidence to support it. * * *"

Determining, therefore, upon our review of the record that there was substantial evidence presented which, if believed, would convince the average mind of defendant's guilt beyond a reasonable doubt, we find no merit to appellant's first proposition of law.

II.

Appellant, in his second proposition of law, alleges that for the reasons stated in his first proposition the verdict in the instant cause was clearly against the weight of the evidence and that the Court of Appeals failed to weigh the evidence.

We find no merit to appellant's second proposition of law. It is the function of the jury to resolve the facts of the case and determine the credibility of the witnesses before it. *State v. Clay* (1972), 34 Ohio St. 2d 250. Thus, it is the accepted rule in Ohio that, where there is a conflict of evidence, the jury is to resolve the conflict, and its judgment will be affirmed if there is substantial evidence which, if accredited, would prove all elements of the crime. *State v. Clay* (1972), 29 Ohio App. 2d 206, affirmed *State v. Clay, supra* (34 Ohio St. 2d 250). In the instant cause, the Court of Appeals stated, in its opinion:

"Upon a careful consideration of the entire evidence, we find ample competent evidence, which if believed by the triers of fact, warrants a finding of guilty beyond a reasonable doubt of the crime as charged. * * *"

The second assignment of error is, accordingly, overruled.

III.

Appellant's third proposition of law provides: "Evidence should be excluded where it does not logically tend to prove or disprove an issue in the case or where its relevancy is outweighed by its tendency to confuse or mislead the jury." The evidence complained of by appellant in this proposition concerns his alibi of incarceration in the Cuyahoga County jail on the day of the murder and appellee's attempt to refute the record-keeping system of the Cuyahoga County jail. We find the Court of Appeals' resolution of this proposition below to be well reasoned. Specifically, appellant presented various records of the Cuyahoga County jail which showed that he should have been in the jail at the time decedent was killed. The Court of Appeals found that having offered the records as proof of the truth therein stated, as well as proof of the facts reasonably to be inferred therefrom, appellant placed in issue the credibility generally of the records, the record-making process and the record keepers.

Upon a review of the contested testimony, we find that it was relevant, in that it tended to disprove the accuracy of the jail records, which was a question in dispute in the instant cause. The contested evidence went to the credibility of the various jail records by demonstrating the overall inefficiency of the persons and the system in which they were maintained and the general lack of inmate supervision.

Moreover, upon an examination of the record, we find that the admission of certain of this testimony occurred without an objection[2] and that a great proportion of

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2. The record reveals that, on the cross-examination of Frank Urankar, numerous questions concerning gambling in the Cuyahoga County jail were asked and answered before appellant's

(*Continued on following page*)

this testimony occurred during cross-examination. The trial judge is posited with broad discretion in controlling cross-examination, and the appellant has the burden to show a patent abuse of discretion. *Sabo v. State* (1928), 119 Ohio St. 231; *State v. McElroy* (1970), 22 Ohio App. 2d 103, 111. We find, in the instant cause, that the admission of this testimony was relevant to the credibility of the jail records which support appellant's alibi and was neither an abuse of discretion nor a resultant prejudicial harm to appellant.

Appellant's third proposition of law is overruled.

IV.

Appellant, in his fourth proposition of law, argues that the trial court erred in permitting Ogeltree and Davidson to testify that they had received a threatening note and that the jail trusty who delivered the note stated that it was from the appellant. Appellant also contends that the trial court erroneously admitted the testimony of one James Curry, that he was told two weeks before the trial by three men not to testify and that they reminded him that he had a brother and sister.

Appellant relies on *Mefford v. State* (1920), 13 Ohio App. 106, wherein the court stated, at page 107:

"Attempts by persons other than the accused to bribe witnesses, or otherwise to suppress or manufacture evidence, are evidence against the accused when, but only when, it is proven that he was connected with such attempts. Acts and statements of third persons, not known or authorized by him, are inadmissible."

Footnote continued—

counsel objected to the specific question as to the extent of the gambling.

Lieutenant Steven Popovich also answered questions concerning gambling in the jail on cross-examination, and the record reveals no objection to these questions being raised by appellant's counsel.

However, in *Mefford, supra,* the court was confronted not with the actions of the accused, but that of his attorney. In the instant cause, Ogeltree testified, without objection, that he received a threatening note which was signed by the appellant. Davidson testified that when he received the note its deliverer, a jail trusty, stated that it was from the appellant.

Furthermore, the Court of Appeals found that this evidence was made proper because of the opening statement of appellant's counsel, which inferred that the testimony of the state's claimed accomplice witnesses was a recent fabrication prompted by a strong motive to swear falsely. The Court of Appeals, therefore, held that this evidence was relevant to show the circumstances under which the state's witnesses had been placed by their election to testify and specifically for the purpose of showing that they had something to lose as well as to gain by testifying.

Assuming, *arguendo,* that the admission of this testimony was erroneous, upon a review of the entire record, disregarding the objectionable testimony by Davidson and Ogeltree, this court finds the error constitutionally harmless. *Harrington v. California* (1969), 395 U. S. 250; *Chapman v. California* (1967), 386 U. S. 18; *Schneble v. Florida* (1972), 405 U. S. 427. In *Schneble, supra,* the United States Supreme Court stated:

"* * * In *Bruton,* the Court pointed out that '[a] defendant is entitled to a fair trial, but not a perfect one.' 391 U. S., at 135, quoting *Lutwak v. United States,* 344 U. S. 604, 619 (1953). Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed

to the conviction, reversal is not required. See, *Chapman v. Calif.*, 386 U. S. 18, 24 (1967). In this case, we conclude that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony * * * been excluded. The admission into evidence of these statements, therefore, was at most harmless error."

In the instant cause, since there was the testimony of at least three persons[3] as to the appellant's participation in the robbery and murder, we find that these statements of threat about testifying, as relating to the appellant's guilt, were merely cumulative of other evidence before the jury.

The testimony of Curry, concerning the threat he received about his testifying, in no manner implied that the appellant was responsible for the threat. Further, appellant has failed to demonstrate any resultant prejudice from its alleged improper admission.

Accordingly, appellant's fourth proposition of law is rejected.

V.

In his fifth proposition of law, appellant states:

"A court order directing that a defendant be incarcerated pending a trial cannot be collaterally attacked by evidence that the defendant was not incarcerated during this period."

Appellant, in this proposition, raises an allegation of error not presented in the court below. In *State v. Williams* (1977), 51 Ohio St. 2d 112, this court reaffirmed, in paragraph two of the syllabus, its adherence to the well-established law that:

3. Ogeltree, Davidson and Rene Clark all testified that appellant actually participated in the robbery and murder of the decedent.

"The Supreme Court will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court. (*Toledo v. Reasonover*, 5 Ohio St. 2d 22, approved and followed.)"

Appellant's proposition of law No. 5 is rejected.

VI.

In his final proposition of law appellant asserts that he was denied the due process of the law because the atmosphere in and around the courtroom was so hostile as to interfere with the trial process. Appellant is arguing, in this proposition of law, that he has a right to be "fairly tried in a public tribunal free of prejudice, passion, excitment and tyrannical power"[4] (309 U. S. 227, 236-237) and that, in the instant cause, this right was denied him by the conduct of the judge and prosecutor.

This proposition of law raises, *inter alia*, the issue presented to the Court of Appeals concerning the admissibility of the testimony of one John Appling and the inquriy of other witnesses as to their knowledge of Appling. It is apparent from the record that appellant at no time objected to any of the proceedings concerning the testimony of Appling. Accordingly, the appellant is precluded by Crim. R. 30 from using this issue on appeal. *State v. Williams, supra* (51 Ohio St. 2d 112). We concur with the Court of Appeals' resolution of appellant's contention concerning the questions asked to certain of the defense witnesses about their knowledge of Appling, who was supposedly in jail on the date of the murder. The questions

4. *Chambers v. Flondie* (1940), 309 U. S. 227, 236-237.

were appropriate under the totality of the circumstances to test the recollection and credibility of the witnesses and the records they purport to support insofar as their accuracy was concerned and whether they, in fact, reflected the presence of persons supposedly confined in the Cuyahoga County jail.

The remaining issues—the misconduct of the prosecutor and the trial judge—presented in this proposition were not raised in the Court of Appeals and need not be considered herein. *Toledo v. Reasonover, supra; State v. Williams, supra.*

Apart from the failure to present these issues in the Court of Appeals, we find that appellant's assertions of errors relating to the misconduct of the prosecutor and trial judge are totally lacking in substance. The assertion that the judge's conduct was not as a disinterested mediator is premised in part upon the following comment made by the judge during the testimony of James Miller, a deputy clerk of courts of the Court of Common Pleas of Cuyahoga County concerning the records pertaining to Walker:

"Q. Can you tell me how many other mistakes you have made?

"Mr. Tolliver: Objection to this, judge.

"The Court: Yes, sustained.

"Q. Nothing further.

"A. I am not a handwriting expert.

"The Court: That answer will be stricken from the record. This witness will be admonished from making a statement without a question before him, sir. You are not in Cuyahoga County today, and the jury will disregard it.

"Mr. Tolliver: Oh, judge.

"The Court: I withdraw that and the jury will disregard my remarks, too."

As the record reflects, the trial judge immediately rectified his statement and admonished the jury to disregard it. This court has examined the other alleged errors, which mainly relate to the trial judge's discretion in control of cross-examination during trial, and, finding them to be without merit, this court will not address them herein.

Appellant's sixth proposition of law is rejected.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C.J., HERBERT, P. BROWN, SWEENEY and LOCHER, *JJ.*, concur.

CELEBREZZE and W. BROWN, *JJ.*, dissent.

CELEBREZZE, *J.*, dissenting. Upon review of the record compiled at the trial of this cause I am of the opinion that reasonable minds must conclude that appellant's guilt was not established beyond a reasonable doubt. I am therefore constrained to dissent from the majority's decision to affirm appellant's conviction and sentence of life imprisonment.

At the outset of the opinion the majority states that its review will be confined to a determination of whether there was substantial evidence present at trial which would establish appellant's participation in the robbery-homicide. The majority then recounts the damning testimony presented by two incarcerated felons who were convicted

as accomplices to this homicide, and who, more than three years after the homicide, first came forward with information as to appellant's alleged involvement in this crime, to be offered in exchange for a recommendation of leniency. The majority further observes that this inherently suspect and untrustworthy testimony is buttressed by the testimony of a young woman who was originally unable to identify appellant in a police line-up, but who, after some degree of encouragement by police officials, was later able to positively identify appellant in the courtroom. It is conceded by the majority that these three individuals were the only witnesses to testify that appellant actually participated in the robbery and murder of the decedent. Nevertheless, the majority concludes that the state presented substantial evidence.

As his defense, appellant presented evidence tending to establish an alibi. The deputy clerk of courts for Cuyahoga County appeared as a witness for the defense, and testified that his records showed that appellant was unable to post bond on an unrelated charge, and therefore was incarcerated in the Cuyahoga County jail during the period from April 14, 1972, until the charge was dismissed on August 1, 1972. The prosecution, in fact, stipulated that the certified copy of the docket entry in the custody of the deputy clerk indicated that appellant was continuously confined for this three and one-half month period. Three fellow inmates of the Cuyahoga County jail during this pertinent period of time also testified that appellant was never absent from the cellblock, except for occasional court appearances. Several individuals employed by the Cuyahoga County sheriff at the time of appellant's confinement testified that each night a body count was taken, and that unless this count corresponded with records kept at the jail's booking desk a thorough search of the cellblock would be in order.

To overcome this evidence of alibi the prosecution introduced the testimony of two men, one of whom was certain he saw appellant on the street in Cleveland in July 1972, while the other man said he too saw appellant on the street in the summer of 1972, although he could not "remember the months and things." In addition, the prosecution brought before the jury's attention a number of distracting and irrelevant facts garnered primarily from newspaper articles, and having to do with, among other things, gambling and the use of drugs in the jail, a hunger strike by the inmates, and the conviction of a former jail officer for theft of certain property.

Appellant moved, pursuant to Crim. R. 29, for a judgment of acquittal at the close of the state's case, and upon conclusion of the defense. The trial court denied both motions. It has been suggested that, in determining the sufficiency of the evidence to withstand a motion for a judgment of acquittal, the proper test is whether, after the evidence and all reasonable inferences that may be drawn therefrom are viewed in the light most favorable to the state, there must be some doubt in a reasonable mind as to the guilt of the accused. See *State v. Hancock* (1976), 48 Ohio St. 2d 147, 151-152. Similarly, the legal test for the sufficiency of alibi evidence is whether it raises a reasonable doubt of guilt. See *Walters v. State* (1883), 39 Ohio St. 215; *State v. Childs* (1968), 14 Ohio St. 2d 56. In light of the nature of appellant's alibi evidence, vis-a-vis the evidence presented by the state in rebuttal of the alibi, there must be some doubt in a reasonable mind as to the guilt of appellant. To conclude otherwise is to argue that the average reasonable mind would be convinced that one confined in the Cuyahoga County jail could manage to escape therefrom, could travel to

another county, there to commit a murder, and could later re-enter the jail facility, undetected, only to be subsequently released by an order of the court. I believe it patently apparent that such a theory is rife with reasonable doubt.

Because the prosecution's case was insufficient to overcome appellant's alibi defense the trial court erred in denying appellant's motion for a judgment of acquittal. I must, therefore, respectfully dissent.

W. BROWN, J., concurs in the foregoing dissenting opinion.

JUDGMENT ENTRY OF THE COURT OF APPEALS

(Filed June 29, 1977)

Case No. CA-4529

IN THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
STARK COUNTY, OHIO

THE STATE OF OHIO,
Plaintiff-Appellee,

vs.

RAYMOND WALKER,
Defendant-Appellant.

For the reasons stated in the Memorandum on file, all five assigned errors are overruled, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed and this cause is remanded to that Court for the execution of sentence.

/s/ NORMAN J. PUTMAN
/s/ LELAND RUTHERFORD
/s/ W. W. BADGER
Judges

OPINION OF THE COURT OF APPEALS

(Filed June 29, 1977)

Case No. CA-4529

IN THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
STARK COUNTY, OHIO

THE STATE OF OHIO,
Plaintiff-Appellee,

vs.

RAYMOND WALKER,
Defendant-Appellant.

PUTMAN, J.

The appellant, Raymond Walker, appeals from a sentence of life imprisonment which was imposed following his conviction of being the triggerman in the July 22, 1972, killing of an off duty City of Canton Policeman during an armed robbery of an A & P grocery store on East Tuscarawas Street in Canton, Ohio.

The conviction came as a result of testimony among others of two claimed accomplices and a disinterested civilian eyewitness who positively identified the defendant in the courtroom.

Upon a careful consideration of the entire evidence, we find ample competent evidence, which if believed by the triers of fact, warrants a finding of guilt beyond a reasonable doubt of the crime as charged. Accordingly, the first and second assigned errors are overruled.

The text of the third assignment of error is "the court erred in permitting the prosecutor to engage irrelevant, scurrilous and prejudicial inquiries pertaining to conditions in the jail at Cuyahoga County". This assigned error is overruled for the following reasons.

In this case the defendant-appellant presented the defense of alibi. He claimed he was in Cuyahoga County Jail at the time of the crime. He presented various records of the operation of the Cuyahoga County Jail which showed at least that he should have been in the Cuyahoga County Jail at the time of the killing. The credibility of the records of the presence of prisoners in the Cuyahoga County Jail was crucial. Having offered the records of the Cuyahoga County Jail as proof of the truth of the matters therein stated as well as proof of all facts reasonably to be inferred therefrom, the defendant placed in issue the credibility generally of the records, the record making process, and the record keepers. Upon a careful consideration of the entire record, we find no error in any ruling of the trial court respecting admissibility of the evidence respecting this issue.

The fourth assigned error complains that the court erred in permitting testimony pertaining to threats and risks by the state's accomplice witnesses. It is not well taken and is overruled. During the opening statement to the jury, defense counsel told the jury that the state's claimed accomplice witnesses, Ogeltree and Davidson, had previously testified in trials in which they had been the accused persons and during which they denied any involvement in the robbery and the death of the victim (R. 14). He pointed out to the jury that he claimed there existed ill will which would motivate Ogeltree to testify falsely against Walker because he claimed Ogeltree believed Walker was associated with Ogeltree's wife (R. 14);

that the defense evidence would show that Ogeltree and Davidson had a conversation in the penitentiary with one Stretch Meyers who would be called as a defense witness (R. 15) about giving up a name of a person who could be accused as the triggerman in the crime so that Ogeltree and Davidson could receive favorable consideration from the government (R. 15). The reasonable inference from these claims was that the two state's claimed accomplice witnesses was a recent fabrication prompted by a strong motive to swear falsely. We hold, upon a careful consideration of the record referred to in this assignment of error, that the evidence of the state was made proper by the foregoing and was relevant to show the circumstances under which the two state's witnesses had been placed by their election to testify and specifically for the purpose of showing that they had something to lose as well as something to gain from their testimony. For that purpose it was relevant and properly admitted. We find no error. The fourth assignment of error is overruled.

The fifth assignment of error complains that the court erred in ordering a witness, John Appling, to testify and in permitting inquiries concerning him throughout the trial.

An examination of the record shows that John Appling was called as a state's witness and refused to take an oath (R. 51). Whereupon the court excused the jury and conducted a lengthy examination of the witness (R. 52-62). Immediately, the jury was returned to the box whereupon the witness responded to questions giving his name and address and indicating that he refused to testify, whereupon he was excused and the jury recessed for a regular recess. We find no objection to any of these proceedings and none has been pointed out to us in oral argument to the briefs. Therefore the error, if any there

was is not cognizable upon appeal. See *State v. Gordon*, 28 Ohio St. 2d 48.

The other questions put to various witnesses respecting their recollection or knowledge or lack of it of Mr. Appling were appropriate under the totality of the circumstances to test their recollection and credibility. An example of this is defense witness, Willie Hightower, a range boss in the Cuyahoga County Jail at the time in question who said "Yes, probably" (R. 342), when asked if Appling was in the Cuyahoga County Jail on the day of the shooting in question.

The equivocal nature of this response was pertinent to the nature of the alibi and is typical of the purpose of the thrust of the type of questions objected to here.

Additionally, we find no motion for mistrial in the record and none has been pointed out to us in the briefs or oral arguments.

For the foregoing reasons, all five assigned errors are overruled, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed and this cause is remanded to that court for the execution of sentence.

RUTHERFORD, P.J. and
BADGER, J. concur.

/s/ NORMAN J. PUTMAN
/s/ LELAND RUTHERFORD
/s/ W. W. BADGER
Judges

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Filed September 8, 1976)

No. 76-6133

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

THE STATE OF OHIO,
Plaintiff,

vs.

RAYMOND WALKER,
Defendant-Appellant.

This cause, having been regularly assigned for Trial, came on for hearing before the Jury, the same being duly impanelled and sworn, upon the Indictment for the crime(s) of First Degree Murder, 1 Ct., (R.C. 2901.01) as charged in the Indictment, and the plea of not guilty heretofore entered by the Defendant, upon the evidence produced on behalf of the State of Ohio and on behalf of the Defendant. The Jury, having been duly charged as to the law of the State of Ohio, and after due deliberation, agreed upon their verdict, whereupon they were conducted into Open Court in the presence of the Defendant and his Attorney, and the verdict, signed by all members of the Jury, was read to the Defendant, and the verdict given, being such as the Court may receive it, it was immediately entered in full upon the minutes. It was the unanimous verdict of the Jury that the Defendant is guilty of the crime(s) of First Degree Murder, 1 Ct. (R.C. 2901.01), as charged in the Indictment.

Thereupon the Prosecuting Attorney moved that sentence be pronounced against said Defendant.

Whereupon the Court was duly informed in the premises on the part of the State of Ohio, by the Prosecuting Attorney, and on the part of the Defendant, by the Defendant and his Counsel, and thereafter the Court asked the Defendant whether he had anything to say as to why judgment should not be pronounced against him and the Defendant, after consulting with his Counsel, said that he had nothing further to say except that which he had already said, and showing no good and sufficient reason why sentence should not be pronounced, the Court thereupon pronounced sentence.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Defendant be committed to the Southern Ohio Correctional Facility, in Lucasville, Ohio, for the remainder of his natural life, or until otherwise pardoned, paroled, or released according to law, on First Degree Murder, 1 Ct., (R.C. 2901.01), and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Court Reporter prepare the Trial transcript for Appeal purposes, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant pay the costs of this prosecution for which execution is hereby awarded.

/s/ HAROLD E. DEHOFF
Judge

Supreme Court of the United States

October Term, 1978
No. 78-1362

Supreme Court, U. S.
FILED
APR 2 1979
MICHAEL RODAK, JR., CLERK

RAYMOND WALKER,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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Supreme Court of the United States

October Term, 1978

No. 78-1362

RAYMOND WALKER,
Petitioner,
vs.
STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

Respondent respectfully submits that there is no substantial federal constitutional question involved in this cause which would invoke jurisdiction of this Court. The petition itself demonstrates that there was substantial evidence which if believed by the Trier of Fact constituted proof beyond a reasonable doubt of all the elements of

the crime charged against the petitioner. As hereafter pointed out the first "question presented for review" by the petitioner does not involve an issue under the due process clause of the Fourteenth Amendment, but in fact involves only the question of credibility of witnesses, a matter to be determined by the jury. Likewise the second "question presented for review" does not arise to constitutional proportions, but involves no more than a determination of the application of Ohio Rules of Evidence. Separately and additionally the petitioners have a remedy under State law in the form of Section 2953.21 of the Ohio Revised Code—the Ohio Post-Conviction Remedy Act (Appendix p. 13).

REASONS FOR DENYING THE WRIT

It is clear that the sole issue raised by the first question presented in petitioner's pleading is one of credibility of the witnesses at the trial of his cause.

The bold assertion that petitioner's conviction is "devoid of evidentiary support" is rebutted by his own analysis of that evidence. He notes that two co-defendants testified against him and identified him as the triggerman in the felony murder.

A totally independent eyewitness, Rene Clark, likewise identified him as the killer (R-268-271). This young lady was simply a patron in the store where the robbery-homicide occurred. The wife of the victim who was standing with him when he was shot testified that the petitioner "looks very much like the man" (R-136).

As noted by the Ohio Supreme Court in its *per curiam* opinion, another witness, Willie Mae Hart, testified to seeing an automobile driven by a man with a bad complexion

similar to petitioner's on the escape route described by the co-defendants shortly after the offense.

Each of these witnesses was subjected to extensive cross-examination to test their credibility. The question of the accuracy or propriety of the in-court identification by the witnesses was never challenged by pretrial suppression proceedings giving rise to an issue of waiver and diluting the value of this cause as vehicle for any precedent.

Petitioner must acknowledge that there was evidence in the record which if believed by the jury supports the judgment. What he urges in his first question presented is that these witnesses should not be believed. That, it is submitted, is a credibility issue. Credibility of any given witness is determined by the jury as a question of fact.

Thus the petitioner's claim that the judgment of conviction is "devoid of evidentiary support" is untrue and misleading. The proposition in fact advanced to this Court by petitioner is that the Court should accept his evaluation of these witnesses' credibility and reject that of a jury which had the witnesses before them. He would likewise require this Court to substitute its judgment on credibility of the alibi evidence for that of the jury.

The alibi claimed was that the defendant was in jail in Cleveland, Ohio at the time of the homicide in Canton. Yet the testimony of two other State's witnesses who knew the defendant placed him on the streets of Cleveland at that time. These were Clarence Cash and James Curry. The testimony of Rene Clark, Warren Davidson, Fred Ogletree and Mable Mack, likewise demonstrated that he was not in jail at the time of the crime. This is a question of disputed fact to be determined by a jury pursuant

to the Trial Court's instruction. The Court's charge has never been challenged either at trial or upon review of this case. The petitioner advanced in the Supreme Court of Ohio as support for his alibi defense the proposition that "a court order directing that a defendant be incarcerated pending a trial cannot be collaterally attacked by evidence that the defendant was not incarcerated during this period". The Ohio Supreme Court rejected this attempt to establish an irrebuttable presumption from the Bench during argument.

An analysis of the cases cited in support of petitioner's first question presented demonstrates that they do not support his position at all. Appropriate tests for the weight of the evidence in a criminal prosecution on due process grounds is set forth in this Court's opinions in *Thompson v. Louisville*, 362 U.S. 199 (1960) and *Harris v. United States*, 404 U.S. 1232 (1971). The test as set out in *Thompson* is:

> "Decisions of this question [whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the due process clause of the Fourteenth Amendment] turns not on sufficiency of the evidence, but on whether this conviction rests upon any evidence at all (362 U.S. 199)."

This cause involved the review of a police court conviction for loitering and disorderly conduct under circumstances where the court determined that there was no evidence at all of the elements of the crime. Compare this then with the petitioner's own statement as to the evidence adduced by the State in the trial of Raymond Walker. Obviously his challenge is not to the sufficiency of the evidence, but rather to the credibility of the witnesses

who testified. *Harris, supra,* simply reiterates the due process standard of *Thompson, supra.* It is distinguishable for the reason that it involved a Federal Narcotics Prosecution. This Court approved *Thompson* and *Harris, supra,* in its 1974 decision in *Uahon v. New Hampshire*, 414 U.S. 478 (1974), where in determining that willfulness was an element of the crime of contributing to the delinquency of a minor, the Court's analysis demonstrated that no evidence of that element appeared in the trial transcript. Appellant's reference to *Washington v. United States*, 357 U.S. 348 (1957) in support of his claim is totally misplaced for it involved a federal prosecution and does not appear to support the proposition that this Court will review the sufficiency of the evidence in State Criminal Convictions.

It is further submitted that this case does not constitute an appropriate vehicle for weighing the problems raised by Mr. Justice Stewart in his dissent in *Freeman v. Zahradnick*, 429 U.S. 111 (1977) or *In Re*: *Winship*, 397 U.S. 358. For the opinions of the State Courts which have reviewed the conviction demonstrate that there was no mere speculation as to whether the evidence was sufficient to support the conviction. To the contrary, the conviction is supported by the testimony of four eyewitnesses to the crime and the additional testimony of three other witnesses to demonstrate that the alibi was insufficient to raise a reasonable doubt. Furthermore, there was no objection to the Court's instruction on burden of proof nor any basis other than speculation that the jury did not follow their instructions or properly determine the credibility of the witnesses. The question of the credibility of witnesses in the trial of a cause is not a constitutional issue. Unless this Court is prepared to reject the historical function of the jury in our system of jurisprudence the

writ herein sought should be denied. Review of this case could accomplish no more than a re-evaluation of witness credibility which has already been tested at two Appellate levels of Ohio Courts.

Petitioner's second contention that the decision of the Supreme Court of Ohio is in conflict with due process pronouncements of this Court is not supported by the authorities proffered. This cause involves no sensational press coverage within the context of this Court's opinions in *Estes v. Texas*, 381 U.S. 735 (1965), *Irwin v. Dowd*, 366 U.S. 717 (1960) and the circus described in *Sheppard v. Maxwell*, 384 U.S. 333 (1966). While citing these authorities petitioner points to no parallel facts. There was no motion for change of venue in the proceedings. Petitioner acknowledges at page 24 of his petition that no outside influences touched the trial of this case. Instead, he would apply the standards of these opinions—fashioned to avoid a recognized due process problem—to the entirely separate and distinct question of a trial judge's discretion in controlling proceedings within his court. At most, this case raises no issue beyond the application of State Rules of Evidence and the generally accepted principle of waiver by failure to object, as noted in the opinion by the Supreme Court of Ohio (Petitioner's Memorandum Appendix pages 33-34). See also *U. S. v. Gaines*, 450 F.2d 186, *Cert. Den.* 405 U.S. 927; *U. S. v. Bessesen*, 433 F.2d 861, *Cert. Den.* 401 U.S. 1009. The State does not dispute petitioner's fundamental right to be "fairly tried in a tribunal free of prejudice, passion, excitement, and tyrannical power", *Chambers v. Florida*, 309 U.S. 227, 236-237 (1940). Nor that at trial dominated by a mob may deny due process as in *Moore v. Dempsey*, 261 U.S. 86 (1923). This Court's determination that a judge who has a "direct personal substantial pecuniary interest" in the trial of the case

deprives the defendant of due process in *Tumey v. Ohio*, 273 U.S. 510 (1927) likewise is inappropriate.

Respondent does dispute the claim that the petitioner in the instant case comes within the purview of these authorities. There is nothing in the record below to compare with *Chambers, supra*, highly inflammatory racial setting with its dragnet arrest or its confession exhorted through complete isolation, intimidation and fear. Nor does it compare with *Moore, supra*, where the defendant had been deprived of assistance of counsel in a trial which lasted forty-five minutes with the jury out only five minutes, the verdict being "based" on testimony of witnesses who had been beaten and tortured until they agreed to say what the prosecution wanted them to say. The cases cited by petitioner in support of his claim that the trial court lacked impartiality are also distinguishable. The petitioner was not tried by a one man judge-grand jury as in *In Re: Murchison*, 349 U.S. 133 (1955) or by a mayor with a pecuniary interest in the outcome of the cause as in *Tumey, supra*. Instead he was tried by a jury, given an extensive voir dire examination, after which the State and the defense indicated their satisfaction. These jurors took an oath and agreed to follow the instructions of the Court as far as the applicable law is concerned. No objection was ever raised on appeal as to the court's charge to the jury and from such a record it should be assumed that the jury properly performed its duty without bias or prejudice. As to the Trial Judge, nothing in the record demonstrates partiality or personal interest in conviction of this defendant. The only support sought by petitioner in the record for his claim that the judge constituted a vengeful second prosecutor was the statement attributed to him some three years prior to the trial that he hoped that the Guy Mack murder could be solved.

No parallels can be drawn between petitioner's trial and those noted by this court in *Estes v. Texas,* 381 U.S. 735 (1965), *Sheppard v. Maxwell,* 384 U.S. 333 (1966), *Irwin v. Dowd,* 366 U.S. 717 (1960), and *Murphy v. Florida,* 421 U.S. 794 (1974). (The latter erroneously cited as *Chambers v. Flondie,* 309 U.S. 227 at page 24 of petitioner's petition.) The court in *Murphy, supra,* characterized each of these cases:

In *Estes,* the extensive televising and broadcasting led to a "circus atmosphere" which interfered with the trial process. In *Irwin,* the extensive trial publicity which led to the impaneling of a jury, eight of whom admitted to preconceived ideas of defendant's guilt caused actual prejudice to the defendant, deprived him of a fair trial. In *Sheppard,* the extremely inflammatory publicity and courthouse given over to accommodate the public appetite for a carnival led to a due process violation. In all these cases there was such overwhelming external influences that a presumption of inherent prejudice was raised. But as in *Murphy, supra,* the defendant-petitioner here cannot make that claim.

The assertions made by the appellant-petitioner have been characterized by Ohio State Courts as matters of evidentiary rulings or matters of the trial court's discretion in control of cross-examination. The Ohio Supreme Court found these objections "totally lacking in substance" or as in the case of the testimony of witness John Appling, waived by failure to object.

Most of the claims of error involved the evidence presented in rebuttal of defendant's alibi. As a matter of state law, both the Ohio Supreme Court and the Fifth District Court of Appeals found this evidence to be relevant and material because appellant had "placed in issue

the credibility generally of the records, the record-making process and the record-keepers". The Ohio Supreme Court held that the "contested evidence went to the credibility of the various jail records by demonstrating the overall inefficiency of persons and the system in which they were maintained and the general lack of inmate supervision". As this Court noted in *Gregger v. Burke,* 334 U.S. 728 (1948) "we cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise every erroneous decision by a state court or state law would come here as a federal constitutional question". (334 U.S. at page 731). In *Buchalter v. Peoples of the State of New York,* 319 U.S. 427 (1943), this Court noted that the due process clause of the federal constitution "leaves the states free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate; and does not permit a party to bring to the test of a decision in this court every ruling made in the course of a trial in a state court" (319 U.S. at pages 430-431). The court went on to state "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the results set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality" (319 U.S. at 431, citing *Adams v. U. S.,* 319 U.S. 269, 281). In *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974), this Court again noted that care must be taken in distinguishing between ordinary trial error and that sort of "egregious misconduct" held to amount to a constitutional denial of due process. *Donnelly, supra,* involved an allegedly improper remark by the prosecuting attorney and this Court noted that corrective measures had been taken (as taken by Judge DeHoff in the instant case regarding the remark concerning witness Miller) and that the allegations

made, even if error, were not enough to make the trial "fundamentally unfair".

The decision of the Supreme Court of Ohio and the Fifth District Court of Appeals for Ohio sought to be reviewed in the instant cause are in compliance with the controlling cases and decisions of this Court. The rule of *Buchalter, supra,* and *Donnelly, supra,* appears to be a strict one placing a burden upon the petitioner to show unfairness and prejudice of a constitutional dimension. Petitioner's complaints in the instant case rise no further than matters of judicial discretion and the Rules of Evidence of the State of Ohio. They certainly do not rise to constitutional dimensions. Since the decision of the Supreme Court of Ohio was based in part upon the Ohio Rule of Evidence whereby waiver of errors rises out of the failure to object at such time as the trial court could avoid or correct the error complained of, petitioner has an adequate remedy for review of those issues so waived as noted in the opinion of the Supreme Court of Ohio. Section 2953.21 of the Ohio Revised Code, the Ohio Post-Conviction Remedy Act, provides for the filing of a petition in the trial court for review of constitutional errors at any time. The question of effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and the applicable provisions of the Ohio Constitution are amenable to review in such proceedings and this issue has not been raised before any Ohio Appellate Court at this point. Since it appears that petitioner fails to raise any substantial federal constitutional question and has an adequate remedy under existing Ohio statutes, it is respectfully submitted that Certiorari should be denied.

CONCLUSION

In light of the foregoing facts and the authorities cited, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

§2953.21 O.R.C.—Petition to vacate or set aside sentence.

(A) Any person convicted of a criminal offense or adjudged delinquent claiming that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a verified petition at any time in the court which imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file such supporting affidavit and other documentary evidence as will support his claim for relief.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of such court. A copy of the petition need not be served by the petitioner on the prosecuting attorney. The clerk of the court in which the petition is filed shall immediately forward a copy of the petition to the prosecuting attorney of that county.

(C) Before granting a hearing the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition and supporting affidavits, all the files and records pertaining to the proceedings against the petitioner, including but not limited to the indictment, the court's journal entries, the journalized records of the clerk of court, and the court reporter's transcript. Such court reporter's transcript if ordered and certified by the court shall be taxed as court costs. If the court dismisses the petition it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within such further time as the court may fix for good cause shown, the prosecuting attorney shall respond by demurrer, answer, or motion. Within twenty days from the date the issues are made up either party may move for summary judgment as provided in section 2311.041 (2311.04.1) of the Revised Code. A bill of exceptions is not necessary in seeking summary judgment. The right to such judgment must appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues, hold the hearing, and make and file written findings of fact and conclusions of law upon entering judgment thereon.

(F) At any time before the demurrer, answer, or motion is filed, the petitioner may amend his petition with or without leave or prejudice to the proceedings. The petitioner may amend his petition with leave of court at any time thereafter.

(G) If the court finds grounds for granting relief, it shall, by its judgment, vacate and set aside the judgment, and shall, in the case of a prisoner in custody, discharge or resentence him or grant a new trial as may appear appropriate. The court may also make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail.

(H) Upon the filing of a petition pursuant to this section by a prisoner in a penal institution who has received the death penalty the court may stay execution of the judgment challenged by the petition.